88-1788

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

DWIGHT'S DISCOUNT
VACUUM CLEANER CITY, INC.,

Petitioner,

v.

THE SCOTT FETZER COMPANY,
KIRBY COMPANY DIVISION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals has the power to reverse and render judgment in favor of a party who has failed to comply with Rule 50, F.R.Civ.P. contrary to *Cone v. West Virginia Pulp and Paper Co.*, 330 U. S. 212, 67 S.Ct. 752 (1947), *Johnson v. New York N.H. and H.R. Co.*, 344 U.S. 48, 73 S.Ct. 125 (1952), *Globe Liquor Co., Inc. v. San Roman, et al*, 322 U.S. 571, 68 S.Ct. 246 (1948), *Fountain v. Filson*, 336 U.S. 681, 69 S.Ct. 754 (1949), and *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S.Ct. 1072 (1967)?

2. Whether, under the Seventh Amendment to the United States Constitution, compliance with Rule 50 in the trial court is a prerequisite to the Court of Appeals' power to render judgment notwithstanding a jury's verdict.

3. Whether the Fifth Circuit has the power to nullify Rule 50 by dispensing with the necessity for compliance therewith before rendering judgment on appeal, contrary to the holdings of every other Circuit Court of Appeals.

4. Whether one panel of the Court of Appeals has the power to overrule all precedence of that Court which has heretofore required compliance with Rule 50 prior to rendition of judgment on appeal when there has been no overriding decision from this Court or change in statutory law.

LIST OF PARTIES

Petitioner Dwight's Discount Vacuum Cleaner City, Inc., Dwight Krzywonski, President, was the Plaintiff in the United States District Court for the Western District of Texas. Respondent, Kirby Company Division of the Scott Fetzer Company, a wholly owned subsidiary of Berkshire Hathaway Corp., was Defendant in this action.

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THE SCOTT FETZER COMPANY,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Dwight's Discount Vacuum Cleaner City, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 28, 1988.

OPINION BELOW

The opinion of the Court of Appeals appears at 860 F.2d 646 (5th Cir. 1988), and is reproduced on pages 20

through 31 of the appendix. The opinion of the United States District Court for the Western District of Texas was not reported but the trial court's judgments before and after reversal are found at pages 1 through 11 of the appendix. Respondent's Motion for Judgment Notwithstanding the Verdict, or Alternatively for New Trial and order overruling the same appear at pages 12 through 19 of the appendix. The judgment of the Court of Appeals appears on pages 32 and 33 of the appendix and the order denying petition for rehearing is at page 39.

JURISDICTION

The trial court's jurisdiction was invoked under 28 U.S.C. 1332. The Court of Appeals' judgment was entered November 28, 1988. A timely petition for panel rehearing was filed on December 19, 1988 and denied on January 25, 1989. This petition for certiorari is filed within 90 days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The 7th Amendment to the United States Constitution which provides:

> Trial by jury in civil cases.
>
> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the

United States, than according to the rules of the common law.

Rule 50 (a) and (b) of the Federal Rules of Civil Procedure which provides in pertinent part as follows:

> Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.
>
> (a) Motion for Directed Verdict: When Made; Effect. . . .A motion for a directed verdict shall state the specific grounds therefor.
>
> (b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; . . . A motion for new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.

Rule 50(a) and (b) is reproduced in its entirety on page 51 of the appendix hereto, and all references to Rule 50 herein are to Rule 50 of the Federal Rules of Civil Procedure.

V.T.C.S. 17.40 et seq, Texas Business and Commerce Code, Deceptive Trade Practice – Consumer Protection Act.

Section 17.45: Definitions

(4) "Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.

(5) "Unconscionable action or course of action" means an act or practice which, to a person's detriment:

(A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or

(B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.

Section 17.50: Relief For Consumers

(a) A consumer may maintain an action where any of the following constitute a producing cause of actual damages:

(3) any unconscionable action or course of action by any person;. . . .

STATEMENT OF THE CASE

Petitioner, Dwight's Discount Vacuum Cleaner City, Inc., filed suit against Respondent, Scott Fetzer Company, Kirby Company Division, on July 14, 1986 alleging, inter alia, violations of the Texas Deceptive Trade Practice – Consumer Protection Act. (the Act), Section 17.50 Texas Business and Commerce Code Annotated.

Trial was to a jury, and after the first witness, Respondent orally moved for a directed verdict on the issue of Petitioner's status as a consumer under Sec. 17.45(4) of the Act, which was denied. (App. 42-43).

When Petitioner rested, Respondent orally renewed its prior motion for directed verdict under Sec. 17.45(4). (App. 43-45). The Court denied the motion and Respondent presented its evidence. (App. 45).

Respondent failed to move for directed verdict on any ground at the close of the evidence. (App. 46). In fact, Respondent affirmatively waived any complaint as to the sufficiency of the evidence to submit the case to the jury. (App. 46).

The jury found for Petitioner, awarding damages and attorney's fees. The Court entered judgment based upon the jury's verdict. (App. 1-10).

Respondent thereafter filed a Motion for Judgment Notwithstanding the Verdict or, Alternatively for New Trial referred to herein as judgment n.o.v. (App. 12). The only ground in the motion for judgment n.o.v. was sufficiency of the evidence to establish Plaintiff's status as a consumer under Section 17.45(4) of the Act. (App. 12-13). The alternative request for new trial alleged insufficient evidence to support the jury's finding of unconscionable conduct under Sec. 17.45(5) of the Act. (App. 13-14) The Court denied both motions. (App. 17-19).

Respondent appealed the trial court's denial of its motion for judgment n.o.v. on the issue of Petitioner's *status as a consumer* and the overruling of the motion for new trial on the ground of the sufficiency of the evidence

to sustain the jury's finding of *unconscionable conduct*. However, neither ground was the basis for the appellate court's reversal. The Court of Appeals was totally misguided in its opinion because it reversed the trial court for failing to grant judgment n.o.v. on the unconscionable conduct issue. Sec. 17.45(5), T.B.C.C. (App. 26, 28, 30, 31). As seen above, this issue was never presented to the trial court nor was it raised as a ground on appeal. (App. 12-16). Nevertheless, the Court determined the evidence was insufficient to support the jury's verdict on that finding, citing *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969).

Boeing Co. v. Shipman, supra, establishes the sufficiency of the evidence standard to be followed when reviewing a trial court's denial of a motion for directed verdict and judgment n.o.v. *Boeing Co. v. Shipman, supra,* is *not* the law in this situation where no such motions were made. *Hinojosa v. City of Terrell, Texas, et al,* 834 F.2d 1223 (5th Cir. 1988) sets out the appropriate standard in this case as shown below. The Court of Appeals reversed the district court's judgment and rendered judgment that Petitioner take nothing. (App. 31).

The petition for panel rehearing brought to the Court's attention Respondent's failure to comply with Rule 50 by failing to move for directed verdict or judgment n.o.v. on the unconscionable conduct issue. (App. 34-38). Petitioner also raised the appellate court's inability to reverse and render judgment on this ground since the sufficiency of the evidence had not been challenged under Rule 50, citing this Court's authority set out below. (App. 34-38).

The petition for rehearing was filed December 19, 1988 and was summarily denied without written opinion or recitation of authority on January 25, 1989. (App. 39).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts Directly With The Decisions Of This Court In *Johnson v. New York, N.H. and H.R. Co.*, 344 U.S. 48, 73 S.Ct. 125 (1952), *Globe Liquor Co., Inc. v. San Roman, et al*, 322 U.S. 571, 68 S.Ct. 246 (1948), *Cone v. West Virginia Pulp and Paper Co.*, 330 U.S. 212, 67 S.Ct. 752 (1947), *Fountain v. Filson*, 336 U.S. 681, 68 S.Ct. 754 (1949), and *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S. Ct. 1072 (1967), And The 7th Amendment To The United States Constitution In That The Court of Appeals Reversed A Jury Verdict And Rendered Judgment In Favor Of A Party Who Failed To Comply With The Procedural Requirements Of Rule 50, F.R.Civ.P.

Rule 50(a), F.R.Civ.P. requires that a motion for directed verdict state the specific *grounds* therefor. Rule 50(b) allows a party who has unsuccessfully moved for a directed verdict *at the close of the evidence* to move for judgment notwithstanding the verdict *in accordance with* the preceding motion for directed verdict. The rule therefore requires a specific motion for directed verdict at the close of *all* the evidence followed by a motion for judgment n.o.v. after judgment on the *same specific grounds* to preserve appellate review of the sufficiency of the evidence. Otherwise, review is limited as demonstrated below.

In *Cone v. West Virginia Pulp and Paper Co.*, 330 U. S. 212, 67 S.Ct. 752 (1947), this Court reviewed an appellate court's erroneous construction of Rule 50 and held that the verdict loser's failure to file a motion for judgment n.o.v. in the trial court under Rule 50(b) precluded the appellate court from directing the trial court to enter judgment contrary to the one the trial court had permitted to stand.

Cone, supra, was reaffirmed in *Globe Liquor Co. v. San Roman,* 332 U.S. 571, 68 S.Ct. 246 (1948), which held it was error for the Court of Appeals to direct the trial court to enter judgment for a party who has failed to first give the trial court an opportunity to exercise its judgment by proper compliance with Rule 50. This Court affirmed the appellate court's remand to the trial court but ordered a new trial rather than entry of judgment because there was no motion made for judgment n.o.v.

In *Fountain v. Filson,* 336 U.S. 681, 69 S.Ct. 754 (1949), this Court held that by granting relief on issues not previously raised in the trial court, the appellate court was denying the verdict winner the opportunity to remedy a defect in his case discovered by the appellate court. The purpose of Rule 50 is to call such defect to the trial court's attention in order to give the opposing party an opportunity to correct it. *Fountain v. Filson, supra* at page 756. In reversing and rendering judgment on a ground not presented in the trial court by motion for judgment n.o.v., the 5th Circuit has committed the very error denounced by this Court in *Cone, Globe Liquor* and *Fountain, supra.*

In *Johnson v. New York, N.H. and H.R.Co.*, 344 U.S. 48, 73 S.Ct. 125 (1952), this Court held that Rule 50 carefully sets out the steps and procedures to be followed as a prerequisite to entry of judgment n.o.v. It provides the exclusive procedural program to be followed by the federal courts prior to entry of judgment n.o.v. and strict compliance is required.

On at least two occasions this Court has been asked and has refused to amend Rule 50 to give appellate courts the power to do what the Court below has done. *Johnson v. New York, supra,* at page 128. The Court of Appeals is bound by this Court's decisions which require strict compliance with Rule 50 as a prerequisite to rendition of judgment; therefore it cannot reverse and render judgment in this situation when all of this Court's precedence forbids it.

The amendments to Rule 50 since its inception in 1938 have never altered the effects of a jury verdict or the scope of appellate review. This was made clear in *Neely v. Martin K. Eby Construction Co.*, 286 U.S. 317, 87 S.Ct. 1072 (1967). Relying on *Cone v. West Virginia Pulp and Paper Co., supra,* and *Globe Liquor Co. v. San Roman, supra,* the Court held that "The opinions in the above cases make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b) . . . " (at page 1078). The lower court has clearly disregarded this precedent.

It cannot be disputed that Respondent failed to move for a directed verdict at the close of the evidence on the ground of unconscionable conduct. Nor can it be disputed that Respondent failed to move for judgment n.o.v. on the ground of unconscionable conduct. Both procedural omissions are apparent from the record that was before the appellate court. (App. 42-46). Therefore, under *Neely, supra,* and its progeny, clearly the Court of Appeals did not have the power to reverse and render judgment in Respondent's favor. The Court has abridged Petitioner's right to a jury trial under the 7th Amendment to the United States Constitution by re-examining a fact issue tried by a jury, in a manner contrary to the rules of law. Rule 50(b), F.R.Civ.P.

Under the hierarchy of the federal court system created by the Constitution and Congress, a precedent of this Court *must* be followed by the lower federal courts. *Hutto v. Davis,* 454 U.S. 370, 102 S.Ct. 703 (1982). The instant Court of Appeals has ignored this federal court hierarchy, consciously or unconsciously, and has rendered a decision contrary to all of this Court's precedent set out above. The Court of Appeals herein has done the very thing that this Court held it powerless to do in *Neely, Johnson, Fountain, Globe Liquor,* and *Cone, supra.* It is urged by Petitioner that this conflict and the importance to the Bench and Bar of the issues involved herein, warrant review by this Court.

II. The Fifth Circuit Has Abridged The Right To Trial By Jury Guaranteed Under The Seventh Amendment To The United States Constitution By Directly Reviewing The Jury's Verdict And Substituting Its Own Factual Findings For Those Of The Jury.

The Seventh Amendment assures that the right to trial by jury shall be preserved and that no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. The adoption of Rule 50(b) did not vary the rights of litigants in jury trials, but rather it made the prior common law statutory to expedite litigation and prevent unnecessary retrials consistent with the Seventh Amendment guarantees. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S.Ct. 189 (1940).

Under the Seventh Amendment, no Court may review or re-examine a factual issue decided by a jury except as allowed by law. The rule that governs the appellate court's right to review a jury's verdict is Rule 50; therefore, it follows that appellate review of a jury verdict below must be in accordance with Rule 50 to pass Constitutional muster. *Neely, supra; Mutual Ben. Health & Accident Assn. v. Thomas*, 123 F.2d 353 (8th Cir. 1941). This is where the Court below committed error of Constitutional proportion.

When the Court of Appeals herein entered judgment contrary to the verdict of the jury where no motion for directed verdict or for judgment n.o.v. had been made below as required by Rule 50, it simply re-examined the facts already tried by the jury. *Baltimore & Carolina Line,*

Inc. v. Redman, 295 U.S. 654; 55 S.Ct. 890 (1935); *Parker v. American Oil Co., supra.* In so doing, the Court violated the Seventh Amendment. *Neely, supra; Lowenstein v. Pepsi Cola Bottling Company of Pennsauken*, 536 F.2d 9 (3rd Cir. 1976); *Mallick v. International Brotherhood of Electrical Workers*, 644 F.2d 228 (3rd Cir. 1981); *Mutual Ben. Health & Accident Assn., supra.*

The Seventh Amendment requires that the Courts accord great deference to a jury's verdict. *Narcisse v. Illinois Central Gulf Railroad Company*, 620 F.2d 544 (5th Cir. 1980). Rule 50 is founded upon Seventh Amendment underpinnings and it should not be readily dispensed with as it was in the Court below. *Mallick v. International Brotherhood of Electrical Workers, supra*, at page 234. The appellate court may have vigorously disagreed with the verdict rendered by the jury, but it cannot simply overlook Respondent's failure to follow the law and seize the opportunity to render the verdict it deems proper or desirable. Such is the evil sought to be protected against by the Seventh Amendment. It guarantees that a jury verdict winner will not capriciously be stripped of its verdict by a reviewing court but only according to law. For the appellate court to seek to find a reason to set aside a jury's verdict is not only contrary to the Seventh Amendment, but it is also contrary to the current trend in the federal appellate system which emphasizes finality of judgment. *United States v. Mechanik*, 475 U.S. 66, 89 L.Ed.2d 50; 106 S. Ct. 938 (1986); *Hartford Accident and Indemnity Co. v. Murphy*, 158 F.2d 506 (5th Cir. 1946).

It is obvious that the Fifth Circuit has abrogated the function of the jury and is now determining the credibility of witnesses and resolving factual inconsistencies which were previously passed upon by the jury and upheld by the trial court. The opinion below is filled with what purport to be factual assertions but which are really opinions drawn by the Court from conflicting facts. (App. 23,. . . . Kirby believed it was entitled to reclaim the goods . . . ; App. 23, . . . after stopping shipment . . . Kirby delivered a letter . . . which terminated the agreement . . . ; App. 28, Dwight's knew exactly what it was doing in this transaction . . . ; App. 29, Dwight's entered into the sale knowing Kirby could have a cause of action against it.)

All of the above findings and many others by the appellate court were factually contested at trial and resolved in Petitioner's favor by the jury. (App. 1-8). The Court has taken that verdict away from Petitioner and substituted its own verdict when there is absolutely no predicate under the law for such action. Petitioner's Seventh Amendment right to trial by jury has been wrongfully denied by the Court below, and such action by the Court undermines the preservation of right to trial by jury and deference to its findings that the Seventh Amendment guarantees.

Petitioner submits that this Constitutional deprivation by the lower Court and the importance of the issues raised herein warrant review by this Court.

III. The Fifth Circuit Court of Appeals Has Rendered A Decision in Conflict With the Decisions of Every Other Circuit Court of Appeals By Holding That Compliance With Rule 50 In The Trial Court Is Not A Necessary Predicate To Rendition Of Judgment On Appeal.

The Fifth Circuit below reversed and rendered judgment in favor of Respondent on a ground not urged by motion for judgment n.o.v. in the trial court. (App. 12-16, 20-31). In this regard, the Court reviewed the sufficiency of the evidence to support the jury's verdict without a legal basis for so doing. This action is contrary to the 7th Amendment and the following cases decided by the remaining circuits.

All of the other Circuits deem compliance with Rule 50 in the trial court to be mandatory before the appellate court can review the sufficiency of the evidence and render judgment contrary to the verdict. *Della Grotta v. State of Rhode Island*, 781 F.2d 343 (1st. Cir. 1986); *Baskin v. Hawley*, 807 F.2d 1120 (2nd Cir. 1986); *Mallick v. International Brotherhood of Electrical Workers*, 644 F.2d 228 (3rd Cir. 1981); *Miller v. Premier Corp.*, 608 F.2d 973 (4th Cir. 1979); *Dixon v. Montgomery Ward*, 783 F.2d 55 (6th Cir. 1986); *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554 (7th Cir. 1987); *Lowe v. Conlee*, 742 F.2d 1140 (8th Cir. 1984); *Farley Transportation Company v. Santa Fe Trail Transportation Company*, 786 F.2d 1342 (9th Cir. 1985); *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324 (10th Cir. 1984); *Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986); *Jones v. Reliance Insurance Company*, 607 F.2d 1 (D.C. Cir. 1979).

Time and space constraints of this petition prevent Petitioner from addressing each opinion above individually at this point. However, the holding of each case cited above precludes an appellate court from reaching the result reached by the Fifth Circuit below. Should this Court grant review herein, each individual case and the specific conflict therein with the opinion below will be fully addressed.

There is absolutely no way to reconcile the conflict between the above decisions of all the other Circuits with the contrary result reached by the Fifth Circuit below. This conflict and the importance of the issues raised herein warrant review by this Court.

IV. By Reversing And Rendering Judgment Herein The Court Of Appeals Below Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings So As To Call For An Exercise Of This Court's Power Of Supervision. The Court Below Has Totally Disregarded All Leading Precedent In The Circuit By Which It Is Bound And Has Rendered Judgment Beyond Its Power.

The entire opinion below is predicated on the false assertion that Respondent moved for judgment n.o.v. in the trial court on the unconscionable conduct issue. "The key question is whether judgment n.o.v. should have been granted on the finding that Kirby acted unconscionably under the D.T.P.A." (App. 26). Judgment n.o.v. was never *requested* on the finding that Respondent acted unconscionably under the D.T.P.A. (App. 12-16). Therefore, the appellate court's reversing and rendering

judgment on this ground because it views the evidence as insufficient to support the jury's verdict is contrary to Rule 50, the Seventh Amendment, and all of the precedence of this Court, and all Circuit Courts cited herein including the Fifth Circuit.

In addition to this Court's precedent, the Fifth Circuit is bound by its own prior decisions. *United States v. Cooper*, 462 F.2d 1343 (5th Cir. 1972). One panel cannot overrule another panel absent an overriding decision from this Court or a change in statutory law. *United States of America v. Don B. Hart Equity Pure Trust*, 812 F.2d 1246 (5th Cir. 1987). Justice Edith Jones, author of the opinion below, has acknowledged the binding effect of precedence in *Blanchard v. Bergeron*, 831 F.2d 563 (5th Cir. 1987) when she wrote, "Appellant failed to cite our circuit's holding, by which we are bound . . . " (at page 564), but the Court failed to follow this law in the instant opinion.

It is for these reasons that the decision below represents such a gross departure by the Fifth Circuit from the accepted and usual course of judicial proceedings so as to call for this Court to exercise its supervisory powers. There is over thirty years of precedence in the Fifth Circuit decisions that prohibits an appellate court from doing the very thing that the appellate court here did, i.e. reversing and rendering judgment where the verdict loser in the trial court failed to move for a directed verdict at the close of the evidence and failed to file a motion for judgment n.o.v. based on a directed verdict motion.

In 1958, in *Yorkshire Indemnity Co. v. Roosth & Genecov Production Company*, 252 F.2d 650 (5th Cir. 1958), the Fifth

Circuit held that it was without power to reverse and render judgment where the party below had failed to comply with Rule 50(b). From 1958 to the present, the Court of Appeals below has adhered to this rule of law until the decision below.

Under *Yorkshire, supra,* the Court below erred in rendering judgment based upon insufficient evidence when no motion for directed verdict or judgment n.o.v. was made at trial. In so doing, the Court directly reviewed whether the jury erred. Federal appellate courts do not have the power to directly review jury verdicts, but may only review rulings of the trial judge which may have affected the verdict. *Parker v. American Oil Company,* 327 F.2d 987 (5th Cir. 1964). In this case, the trial judge was never requested to rule on the sufficiency of the evidence of unconscionable conduct since no motion for directed verdict or for judgment n.o.v. was made. (App. 12-16, 42-46). Therefore, rather than reviewing a ruling by the trial judge, the appellate court below reviewed the jury's verdict directly, which it cannot do. *Parker, supra.*

Recently in *Hinojosa v. City of Terrell, Texas, et al,* 834 F.2d 1223 (5th Cir. 1988), the Court below again reaffirmed that absent a motion for directed verdict, a motion for judgment n.o.v. cannot be sustained. Appellate review is limited to whether there was *any* evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in manifest miscarriage of justice. *Hinojosa v. City of Terrell, Texas, supra,* at page 1228. If there is *any* evidence to support the verdict, the appellate court *must*

affirm the trial court judgment regardless of the sufficiency of such evidence. If *no* evidence exists, appellate relief is limited to ordering a new trial. *Hinojosa v. City of Terrell, Texas, supra* at page 1228.

In complete contradiction to the opinion below, in 1986 in *In Re Owners of Harvey Oil Center v. Merchants Trust and Savings Bank, et al,* 788 F.2d 275 (5th Cir. 1986), Justice Jones wrote that because the complaining party failed to move for directed verdict under Rule 50, the motion for judgment n.o.v. had no proper predicate. Justice Jones then reviewed the evidence to ascertain whether there was *any* evidence to support the jury's verdict, regardless of its sufficiency, or whether plain error was committed. (page 278). Cited as authority are Rule 50 and two Fifth Circuit cases. *Stewart v. Thigpen,* 730 F.2d 1002 (5th Cir. 1984) and *Bunch v. Walter,* 673 F.2d 127 (5th Cir. 1982). These very authorities, as well as Justice Jones' own opinion in *In Re Owners of Harvey Oil Center v. Merchants Trust and Savings Bank, supra,* were among those disregarded by the lower court though brought to its attention in the petition for rehearing. (App. 34-38).

Accordingly, the appellate court erred in reversing the judgment under *Harvey Oil, supra, Hinojosa v. City of Terrell, Texas, supra,* and the cases cited herein. There is no question but that the verdict below was supported by evidence as a matter of law. The Court's opinion acknowledged the existence of evidence to support the verdict, but found it insufficient. (App. 24-25, 28). This was an improper basis for reversal. Under *Hinojosa, supra,*

and its precedence affirmance of the trial court judgment was required.

Between *Yorkshire Indemnity Co. v. Roosth, et al, supra,* in 1958 and *Hinojosa v. City of Terrell, Texas, supra,* in 1988, the Fifth Circuit has rendered over eighteen different opinions on this point which are still precedent. For the sake of brevity, Petitioner has indexed said authorities on pages 40 and 41 of the appendix rather than citing each at this point. The opinion below operates to overrule this vast body of law contrary to *United States of America v. Don B. Hart Equity Pure Trust, supra,* and therefore the decision must be reviewed by this Court.

Petitioner, other litigants, and the Courts are left not knowing the state of the law in this regard. Is the opinion below now the law, or are the opinions rendered before it still the law? Certainly no reconciliation can be effected between the two conflicting results.

Petitioner submits that litigants and the Court should have the right to rely on the precedent of the Court below. Precedent exists to prevent anarchy within the judicial system and the same must be followed to preserve the hierarchy of the system. *Hutto v. Davis,* 454 U.S. 370, 70 L.Ed.2d 556, 102 S.Ct.703 (1982). *Black's Law Dictionary,* Revised 4th Edition, 1968, defines anarchy as "Absence of government; state of society where there is no law or supreme power; lawlessness or political disorder; destructive of, and confusion in, government." By disregarding thirty or more years of precedence in its own circuit, by ignoring the dictates of this highest Court and the Constitution, and by creating a fictional record to

support a desired result, the Court below has wrought the most serious kind of anarchy upon our judicial system and has so far departed from the accepted and usual course of judicial proceedings so as to call for this Court to exercise its supervisory powers. The conflict between the opinion below and all previous opinions of the Fifth Circuit on this matter, as well as the importance of the issues raised herein, warrant review by this Court.

CONCLUSION

Petitioner submits that the decision below is erroneous and constitutes a precedent-setting error of Constitutional magnitude. The Fifth Circuit Court of Appeals has flagrantly disregarded the binding precedent of this Court established since at least 1947. It has rendered an opinion that directly conflicts with every other Circuit Court of Appeals on the issues raised herein. In addition, the Court has disregarded *all* of its *own* precedent by which it is bound by law.

The lower court's opinion nullifies the purpose, intent, and effect of Rule 50, F.R.Civ.P. In so doing, it changes the scope of appellate review heretofore established and relied upon by the courts and litigants. If unreviewed by this Court, a dangerous precedent is established for the erosion of the Seventh Amendment and the right to trial by jury. If left to stand, the opinion below will have far-reaching effects beyond the issues set forth herein. For these reasons, a writ of certiorari should

issue to review the judgment and opinion of the Fifth Circuit below.

RESPECTFULLY SUBMITTED,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DWIGHT'S DISCOUNT VACUUM CLEANER CITY, INC., Plaintiff,	§	CIVIL ACTION NO. W-86-CA-143
v.	§	(Filed Oct. 14, 1987)
THE SCOTT FETZER COMPANY, KIRBY COMPANY DIVISION, Defendant.	§	

JUDGMENT

This action came on for trial on the 8th day of September, 1987, before the Court and a jury, the Honorable Walter S. Smith, Jr., District Judge, presiding. Plaintiff and Defendant appeared and announced ready for trial and a jury of six good men and women having been duly impaneled, the case proceed to trial. At the conclusion of the evidence, the Court submitted the case to the jury on Special Interrogatories and on September 11, 1987, the jury returned its verdict on said Special Interrogatories as follows:

SPECIAL INTERROGATORY NUMBER ONE

Do you find from a preponderance of the evidence that the Defendant tortiously interfered with a contract between Plaintiff and Weeks?

Answer: "We do not."

SPECIAL INTERROGATORY NUMBER TWO

Do you find from a preponderance of the evidence that Defendant converted the vacuum cleaners and accessories from Plaintiff?

Answer: "We do not."

If you have answered Special Interrogatory Number One and/or Special Interrogatory Number Two "We do," then answer Special Interrogatory Number Three; otherwise, do not answer Special Interrogatory Number Three, but proceed to Special Interrogatory Number Four.

SPECIAL INTERROGATORY NUMBER THREE

Do you find from a preponderance of the evidence that such conduct as you have found to have been committed by Defendant in your answers to Special Interrogatory Number One and/or Special Interrogatory Number Two to have been willful or malicious conduct?

Answer: N/A

SPECIAL INTERROGATORY NUMBER FOUR

Do you find from a preponderance of the evidence that Defendant engaged in an unconscionable action or course of action toward Plaintiff in connection with stopping shipment from the warehouse on the vacuum cleaners and accessories in question?

Answer: "We do"

If you have answered Special Interrogatory Number Four "We do," then answer Special Interrogatory Number

Five; otherwise, do not answer Special Interrogatory Number Five.

SPECIAL INTERROGATORY NUMBER FIVE

Do you find from a preponderance of the evidence that such conduct as you have found to have been committed by Defendant in your answers to Special Interrogatories Number Four, to have been a producing cause of actual damages sustained by Plaintiff?

Answer: "We do"

If you have answered Special Interrogatory Number One "We do," then answer Special Interrogatory Number Six; otherwise, do not answer Special Interrogatory Number Six.

SPECIAL INTERROGATORY NUMBER SIX

Do you find from a preponderance of the evidence that Defendant's interference with the contract between Plaintiff and Weeks was supported by justifiable cause or excuse?

Answer: N/A

If you have answered Special Interrogatory Number Four "We do not," then answer Special Interrogatory Number Seven; otherwise, do not answer Special Interrogatory Number Seven.

SPECIAL INTERROGATORY NUMBER SEVEN

Do you find from a preponderance of the evidence that Plaintiff's suit against Defendant is groundless and brought in bad faith, or for the purpose of harassment?

Answer: N/A

SPECIAL INTERROGATORY NUMBER EIGHT

Do you find from a preponderance of the evidence that Plaintiff and Weeks conspired to breach the distributorship agreement between Defendant and Weeks?

Answer: "We do not."

SPECIAL INTERROGATORY NUMBER NINE

Do you find from a preponderance of the evidence that Plaintiff interfered with the distributorship contract between Defendant and Weeks:

Answer: "We do"

If you have answered Special Interrogatory Number Eight and/or Special Interrogatory Number Nine "We do," then answer Special Interrogatory Number Ten; otherwise, do not answer Special Interrogatory Number Ten.

SPECIAL INTERROGATORY NUMBER TEN

Do you find from a preponderance of the evidence that such conduct as you have found to have been

committed by Plaintiff in your answers to Special Interrogatory Number Eight and/or Special Interrogatory Number Nine was willful and malicious?

Answer: "We do not."

SPECIAL INTERROGATORY NUMBER ELEVEN

What amount of money, if any, if paid now in cash, do you find from a preponderance of the evidence would reasonably compensate the Plaintiff for its actual damages, if any, sustained as a result of the conduct of Defendant?

In answering this Special Interrogatory, you may consider the following elements of damages and none other:

Answer each subsection in dollars and cents, or "none."

a. Amounts paid by Plaintiff to purchase the vacuum cleaners and accessories in question.

Answer: $28,740.00

b. Loss of reasonably expected profits from the resale of the vacuum cleaners and accessories in question.

Answer: None

c. Extra expenses for travel, meals, and lodging incurred by Plaintiff in its efforts to conclude the transaction in question.

Answer: None

d. Loss of reasonably expected profits from sales lost as a result of Plaintiff's frozen line of credit at MBank.

Answer: None

SPECIAL INTERROGATORY NUMBER TWELVE

What amount of money, if any, do you find from a preponderance of the evidence that Plaintiff should be awarded against Defendant as punitive damages?

Answer in dollars and cents or "none."

Answer: None

If you have answered Special Interrogatory Number Four "We do not," then you may consider Plaintiff's attorneys fees as an element of punitive damages; otherwise, you may not do so.

SPECIAL INTERROGATORY NUMBER THIRTEEN

What amount of money do you find to be reasonable and necessary attorney's fees for the services by Plaintiff's attorney as follows:

Answer each subsection in dollars and cents, or "none."

a. for legal services rendered in the preparation and trial of this cause in this court?

Answer: $89,000.00

b. for legal services if this case is appealed to the Court of Appeals?

Answer: None

c. for legal services if this case is appealed to the Supreme Court?

Answer: None

SPECIAL INTERROGATORY NUMBER FOURTEEN

What amount of money, if any, if paid now in cash would reasonably compensate the Defendant for its damages, if any, sustained as the result of the conduct of the Plaintiff?

Answer each subsection in dollars and cents, or "none."

a. Loss of the benefit of the sale of the vacuum cleaners and accessories in question.

Answer: None

b. Loss of sales resulting from the termination of Weeks and the disruption of her distributorship organization.

Answer: None

SPECIAL INTERROGATORY NUMBER FIFTEEN

What sum of money, if any, do you find from a preponderance of the evidence that Defendant should be awarded against Plaintiff as punitive damages?

Answer: None

SPECIAL INTERROGATORY NUMBER SIXTEEN

What sum of money do you find to be reasonable and necessary attorney's fees for legal services rendered by Defendant's attorney as follows:

Answer each subsection in dollars and cents, or "none."

a. for legal services rendered in the preparation and trial of this cause in this court?

Answer: None

b. for legal services if this case is appealed to the Court of Appeals?

Answer: None

c. for legal services if this case is appealed to the Supreme Court?

Answer: None

Based on the pleadings and the findings of the jury in response to the Special Interrogatories, it is the judgment of the Court that the following relief should be granted, therefore,

IT IS, HEREBY ORDERED, ADJUDGED, and DECREED that:

1. Plaintiff have and recover judgment against Defendant in the amount of TWENTY-EIGHT THOUSAND SEVEN HUNDRED FORTY DOLLARS ($28,740.00) as actual damages plus prejudgment interest on the amount of such actual damages at the legal rate.

2. Plaintiff have and recover judgment against Defendant in the amount of TWO THOUSAND DOLLARS ($2,000.00) as extra damages pursuant to Tex. Bus. Comm. Code § 17.50(b)(1) (Vernon Supp. 1987).

3. Plaintiff have and recover judgment against Defendant in the amount of EIGHTY-NINE THOUSAND DOLLARS ($89,000.00) for attorneys' fees.

4. Defendant's Application for Injunctive Relief be DENIED.

SIGNED this 14th day of October, 1987.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DWIGHT'S DISCOUNT VACUUM CLEANER CITY, INC., Plaintiff,	)	CIVIL NO. W-86-CA-143 (Filed Feb. 22, 1989)
v.	)	
THE SCOTT FETZER CO., Kirby Co. Division, Defendant.	)	

JUDGMENT

This action came on for trial before the Court and a jury on September 8-11, 1987. This Court entered judgment on the jury verdict for the Plaintiff. The Defendant appealed the Court's judgment to the Fifth Circuit Court of Appeals. The Court of Appeals reversed the judgment of this Court, and judgment was rendered that Plaintiff take nothing. The Court of Appeals then remanded the case to this Court for further proceedings in accordance with its opinion. Accordingly, the Court enters its judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff Dwight's Discount Vacuum Cleaner City, Inc. take nothing of and from Defendant, The Scott Fetzer Co., Kirby Co. Division.

IT IS FURTHER ORDERED that costs of court be taxed against Plaintiff.

SIGNED this 22d day of February, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DWIGHT'S DISCOUNT VACUUM CLEANER CITY, INC., PLAINTIFF	CIVIL ACTION NO. W-86-CA-143
V.	(Filed Oct. 23, 1987)
THE SCOTT FETZER COMPANY, KIRBY COMPANY DIVISION, DEFENDANT	

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, ALTERNATIVELY, FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

The Scott Fetzer Company, Kirby Company Division, defendant, moves the Court for Judgment Notwithstanding the Verdict in accordance with the provisions of Rule 50 of the *Federal Rules of Civil Procedure* or, alternatively, for new trial in accordance with the provisions of Rule 59 and, in support thereof, would respectfully show the Court as follows:

I. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A. Defendant moves the Court for Judgment Notwithstanding the Verdict on the ground that the only basis for the recovery of damages by plaintiff in this cause is the Jury's answer to Special Interrogatory 4 wherein the jury found that defendant engaged in an unconscionable action or course of action toward plaintiff

under the *Texas Deceptive Trade Practices Act*. Defendant would show that plaintiff is not entitled to recovery under said Act for the reason that plaintiff did not plead, prove, or procure a finding or otherwise establish that it is a consumer under said Act. Consumer status is a prerequisite to recovery under the Act.

B Defendant would show that its right to seek judgment notwithstanding the verdict on this point has been properly preserved in accordance with the provisions of Rule 50(b) of the *Federal Rules of Civil Procedure* in that defendant moved for directed verdict both at the close of plaintiff's evidence and at the close of all evidence in the case.

II. MOTION FOR NEW TRIAL

A. In the event that the Court disagrees that defendant is entitled to judgment notwithstanding the verdict, defendant alternatively asks the Court to grant a new trial on the ground that there is insufficient evidence to support the Jury's finding of an unconscionable action or course of action on defendant's part in answer to Special Interrogatory 4 as that term was defined for the Jury in the Court's Charge. Specifically, all evidence adduced at trial demonstrated quite clearly that the plaintiff's chief executive officer and primary actor in the operative facts of the case, Dwight Krzywonski, is an extremely experienced and capable entrepreneur in the vacuum cleaner business. That being the case, it would have been impossible for defendant to take "advantage of the lack of knowledge, ability, experience, or capacity" of Krzywonski and the plaintiff "to a grossly unfair degree."

Furthermore, the only damages the jury found the plaintiff to have sustained other than the attorneys' fees incurred by it was the amount found in answer to Special Interrogatory 11a, which represents the purchase price of the shipment of vacuum cleaners and accessories that form the basis of this lawsuit. By plaintiff's own admission and that of its attorney, Mr. Charles M. McDonald, made in open court, those funds have been tendered into the registry of the Superior Court of Spokane County, Washington pending resolution of a dispute by that Court based on the same operative facts that underly the case at bar in this Court. Furthermore, by plaintiff's own admission through Mr. Krzywonski, it has recovered the additional $9,000 which it paid to Carol J. Weeks, the distributor of defendant from whom plaintiff sought to acquire that shipment of vacuum cleaners and accessories. That being the case, there can be no "gross disparity between the value received and the consideration paid" by plaintiff in the transaction in question.

B. Defendant would further show that the Jury's finding of unconscionability in answer to Special Interrogatory 4 conflicts factually, legally, and logically with the Jury's answers to Special Interrogatories 1, 2, and 9. The Jury refused to find that defendant had interfered in any contract between plaintiff and Carol J. Weeks or that defendant had converted the shipment of vacuum cleaners and accessories in question from plaintiff. This is consistent with the Court's instructions to the jury that a cash seller has a right to reclaim goods sold to a buyer in breach, provided that the right to reclaim is exercised within ten days of receipt of said goods by the buyer. The court further charged the Jury that receipt means actual

physical possession. The unrefuted evidence in the case at bar clearly established that defendant exercised its right to reclaim before the goods were ever received by the buyer (Weeks). In answer to Special Interrogatory 9, the Jury found that plaintiff had interfered in defendant's contract with Weeks. Yet, in answer to Special Interrogatory 4, the Jury found that defendant's conduct toward plaintiff constituted an unconscionable action or course of action. Thus the Jury has, in essence, found that defendant was guilty of unconscionable conduct in exercising a right given to it by law and in seeking to protect itself from the interference in its contract with its distributor, thereby giving rise to a conflict that cannot be reconciled.

C. In the event that a new trial is granted, defendant hereby waives its right to trial by jury.

WHEREFORE, defendant requests that judgment notwithstanding the Jury's verdict be rendered in its favor or, alternatively, that a new trial be granted.

Respectfully submitted,

NAMAN, HOWELL, SMITH & LEE, P. C.
Texas Center
P. O. Box 1470
Waco, Texas 76703
817/754-1421

BY: /s/ Steve L. Moody
Steve L. Moody
State Bar No. 14310300

Attorneys for Defendant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Defendant's Motion has been mailed by United States mail, postage prepaid, to Charles M. McDonald, attorney for plaintiff, P. O. Box 1672, Waco, Texas 76703 on the 23rd of October, 1987.

/s/ Steve L. Moody
Steve L. Moody

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DWIGHT'S DISCOUNT VACUUM CLEANER CITY, INC., Plaintiff,	§	CIVIL ACTION NO. W-86-CA-143
v.	§	(Filed Dec. 4, 1987)
THE SCOTT FETZER COMPANY, KIRBY COMPANY DIVISION, Defendant.	§	

O R D E R

Came on to be considered Defendant's Motion for Judgment Notwithstanding the Verdict or, Alternatively, Motion for New Trial. With regard to its motion for judgment notwithstanding the verdict, the Defendant argues that the Plaintiff failed to "plead, prove, or procure a finding or otherwise establish that it is a consumer" under the Texas Deceptive Trade Practices Act and, therefore, the Plaintiff is not entitled to recover under the Act. However, this Court is of the opinion that the Plaintiff did, indeed, plead its consumer status by pleading facts, which went uncontroverted by the defense, that establish as a matter of law that the Plaintiff qualifies as a consumer under the statute's liberal definition. In order for the Defendant's argument to have the force desired, it had to object to or controvert the Plaintiff's allegations that it was a corporation which sought to acquire goods by purchase. The Court finds no substance to the complaint that the Plaintiff failed to use the word "consumer" in its pleadings. Consequently, Defendant's

Motion for Judgment Notwithstanding the Verdict lacks merit and should be denied.

The Defendant also moves the Court for a new trial on the grounds that 1) there was insufficient evidence to support a finding of unconscionable action on the part of the Defendant, and 2) that the jury's answers to the special interrogatories were conflicting. As to the latter, the Court finds no conflict in the jury's answers to the special interrogatories. The question of whether the Defendant interfered with the contract between the Plaintiff and Weeks is entirely distinct from the question of whether the jury believed the Defendant had acted unconscionably with respect to some other portion of the transaction such as the stopping of shipment or the failure to directly refund the purchase price, for instance. The Court declines to simply guess at the reasoning behind the jury's answers and create a conflict that does not appear on the face of the answers.

As to the Defendant's insufficiency argument, this Court cannot substitute its evaluations of the evidence for that of the jury. There was enough evidence in this case of questionable conduct on the part of the Defendant that this Court is unable to conclude the evidence was so deficient that a reasonable person could not find the Defendant engaged in an unconscionable course of action. The seventh amendment to the Constitution requires that great deference be given to jury verdicts to protect the right of trial by jury. *Narcisse v. Illinois Central Gulf Railway Co.*, 620 F.2d 544 (5th Cir. 1980). "[F]acts once found by a jury in the context of a civil trial are not to be reweighed and a new trial granted lightly." *Id.* at 546. Thus, all reasonable efforts should be made to

uphold a jury's verdict and a trial court should only disturb such a verdict upon a showing that it is clearly against the great weight of the evidence. *Evans v H. C. Watkins Memorial Hospital*, 778 F.2d 1021 (5th Cir. 1985). It is this Court's opinion that the Defendant has not made a showing of insufficiency of the evidence which would warrant overturning the jury's verdict. Accordingly,

IT IS ORDERED that the Defendant's Motion for Judgment Notwithstanding the Verdict and, Alternatively, Motion for New Trial be and is hereby DENIED.

SIGNED this 4th day of December, 1987.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES
DISTRICT JUDGE

DWIGHT'S DISCOUNT VACUUM CLEANER CITY, INC.,
Plaintiff-Appellee

v.

The SCOTT FETZER COMPANY, Kirby Company Division,
Defendant-Appellant.

No. 87-1939.

United States Court of Appeals,
Fifth Circuit.

Nov. 28, 1988.

In vacuum cleaner retailer's suit for alleged violations of Texas Deceptive Trade Practices and Consumer Protection Act, the United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., entered judgment on jury verdict for retailer. Manufacturer appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that manufacturer did not act unconscionably under Act by requesting that merchandise sold by distributor to retailer without authorization not be released from warehouse.

Reversed and rendered.

Beverly Willis Bracken, Steve L. Moody, Naman, Howell, Smith & Lee, Waco, Tex., for defendant-appellant.

Merrilee L. Harmon, Charles M. McDonald, Waco Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, JOHNSON, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge.

Defendant Scott Fetzer Co., Kirby Co. Division ("Kirby"), appeals a judgment and jury verdict rendered against Kirby for alleged violations of the Texas Deceptive Trade Practices and Consumer Protection Act. Judgment was awarded to plaintiff Dwight's Discount Vacuum Cleaner City ("Dwight's") in the amount of $28,470, plus $2,000 in additional damages and $89,000 in attorneys' fees. Finding this judgment to be in error, we reverse and render judgment for defendant Kirby.

I.

Dwight Krzywonski, owner of Dwight's Discount Vacuum Cleaner City, operates a store where he sells vacuum cleaners and other appliances at discount prices. One of the brands of new vacuum cleaners that Dwight's sells is the Kirby line of vacuums.

Dwight's acquires its Kirby vacuum cleaners from Kirby distributors. In selling to Dwight's, however, the Kirby distributors violate their distributorship agreements with Kirby because Kirby's marketing system is organized exclusively on direct in-home sales. Any sales a distributor makes to Dwight's, if discovered by Kirby, could lead to Kirby's immediate termination of its distributor agreement with the offending distributor. Dwight's has successfully persuaded a number of distributors to

ignore their agreements with Kirby through promises that Kirby would never find out about these forbidden sales transactions. Dwight's attracts distributors by such methods as agreeing to efface serial numbers from the machines and agreeing to fill out warranty cards as if individual consumers had purchased the vacuums directly from the distributors after an in-home demonstration. Kirby refers to such deceptive activities on Dwight's part as "bojacking."

Carol Weeks was a Kirby distributor in Spokane, Washington. In June 1986, Weeks agreed to begin employment as a distributor for Viking Vacuum Cleaner Co. Despite her new employment and despite Kirby's prohibition against dual distributorships, Weeks ordered from Kirby 120 vacuum cleaners and shampoo attachments on June 13, 1986. Kirby shipped the merchandise on June 16, 1986, and the 120 units arrived at a warehouse in Spokane on June 26, 1986. In the meantime, Weeks contacted Dwight's and offered to sell the store those 120 units at $75 above cost or about $38,000. Weeks made this offer in disregard of her obligation under the distributorship agreement to sell Kirbys only to individuals through the in-home sales program. Dwight's agreed to the terms of the sale and arranged to pay for the merchandise by means of two cashier's checks. Dwight Krzywonski arrived in Spokane on July 1, 1986 and presented Weeks with the two cashier's checks, one in the amount of $28,740 and the other for $9,000. Krzywonski and Weeks proceeded to the Bank of Spokane, which held the original bill of lading on the 120 vacuums. Weeks delivered the $28,740 cashier's check to the bank, and the bank released the bill of lading on the 120 Kirbys.

In the meantime, Kirby learned that Weeks was attempting to sell the 120 vacuums to the retailer Dwight's. Kirby also learned that Weeks had abandoned the office from which she had conducted her business as a Kirby distributor. Since Kirby believed it was entitled to reclaim the 120 vacuum cleaners, Kirby contacted the warehouse and requested that the merchandise not be released. Due to the contested title, the warehouse agreed to not release the vacuum cleaners.

After stopping shipment of the units, Weeks' superiors at Kirby delivered a letter at Weeks' last-known office and in the letter terminated the distribution agreement. Kirby cited as reasons for Weeks' termination her attempted sale of the 120 vacuums to Dwight's and her vacating her office without notice to Kirby.

Shortly thereafter, Kirby sued Weeks and Dwight's in Washington and Ohio. Dwight's sued Kirby in federal district court in Texas, alleging tortious interference with contract, conversion, and unconscionable acts violative of the Texas Deceptive Trade Practice Act. Kirby moved for a change of venue in the Texas action, but the district court denied the motion. Kirby next sought a writ of mandamus from the Fifth Circuit. This Circuit refused to grant Kirby's writ. In October 1986, Kirby deposited in the registry of the court in Washington the $28,740 that it had received from the Bank of Spokane for the 120 vacuum cleaners.

Prior to trial in Texas, Kirby filed a counterclaim against Dwight's for tortious interference with the distributorship agreement between Kirby and Weeks. Also before trial, Weeks returned to Dwight's the $9,000 she

had received as her payment for the 120 units. At trial, a jury found that Kirby had not interfered with the contract between Dwight's and Weeks and that it had not converted property belonging to Dwight's. The jury did find, however, that Kirby had committed unconscionable acts under the Texas DTPA and awarded Dwight's $28,740 in actual damages and $89,000 in attorneys' fees. Although the jury found for Kirby on the counterclaim, it awarded no damages. The court accordingly entered judgment for Dwight's in the amount of $28,740 as actual damages, $2,000 in extra damages, and $89,000 in attorneys' fees.

Kirby alone appeals, challenging the jury verdict and judgment under the Texas DTPA. Kirby argues that under Texas law Dwight's is not a consumer for DTPA purposes or, alternatively, if Dwight's is a consumer, Kirby has not committed any unconscionable acts violative of the DTPA.

II.

Appellant Kirby properly preserved its objections to the suffiency of the evidence by means of a motion for judgment notwithstanding the verdict. We review the trial court's denial of this motion under the standard set forth in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir.1969):

> The Court should consider all of the evidence – not just that evidence which supports the non-mover's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive

> at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question.

Judged by this standard, the evidence in the record does not support the conclusion that Kirby's actions were unconscionable as the Texas DTPA defines the concept of "unconscionability."

Section 17.50 of the Texas Deceptive Trade Practices and Consumer Protection Act provides:

> (a) A consumer may maintain an action where any of the following constitutes a producing cause of actual damages:
>
> (3) any unconscionable action or course of action by any person

Tex.Bus. & Com.Code Ann. § 17.50 (Vernon's 1987). Texas courts have held that one must be a consumer to maintain a private cause of action for damages and attorney's fees under this section of the Act. *Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382, 388 (Tex.1982); *Riverside National Bank v. Lewis*, 603 S.W.2d 169, 173 (Tex.1980); *Martin v. Lou Poliquin Enterprises, Inc.*, 696 S.W.2d 180, 183 (Tex.App. – Houston [14th Dist.] 1985, writ ref'd n.r.e.).

The statute itself defines "consumer" to include "an individual partnership, [or] corporation . . . who seeks or acquires by purchase or lease any goods or services." Tex.Bus. & Com.Code Ann. § 17.45(4). A plaintiff establishes standing as a consumer in terms of his relationship to the transaction, and not by contractual relationship with the defendant. The only requirement is that the goods or services sought or acquired must form the basis of the plaintiff's complaint. *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex.1983); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex.1981).

In the instant case, Kirby contends that Dwight's failed to plead consumer status and, therefore, Dwight's should be barred from recovery under the DTPA. Dwight's, however, did allege a cause of action under the DTPA. We have been unable to locate any Texas case holding in circumstances like these that Dwight's was a DTPA "consumer" vis-a-vis Kirby. We may, however, assume *arguendo* that he satisfied this test because the second issue which Kirby raises is dispositive of the case.

The key question is whether judgment n.o.v. should have been granted on the finding that Kirby acted unconscionably under the DTPA. Essentially, Kirby contends that under the definition of "unconscionable action" none of Kirby's acts in this case violates the DTPA. The statute defines unconscionable action as an act or practice which, to a person's detriment:

> (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or

> (B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.

Tex.Bus. & Com.Code Ann. § 17.45(5). Unconscionable action, by the terms of the statute, then, is an act or practice which either (a) is overbearing and evidences misuse of superior bargaining power or (b) results in a gross disparity between consideration paid and value received.

In *Chastain v. Koonce,* the Texas Supreme Court refined the definition of "unconscionable action." 700 S.W.2d 579 (Tex.1985). *See also Chandler v. Housholder,* 722 S.W.2d 217, 218-19 (Tex.App. – Eastland 1986, writ ref'd n.r.e.); *Tri-Continental Leasing Corp. v. Law Office of Richard W. Burns,* 710 S.W.2d 604, 609 (Tex.App. – Houston [1st Dist.] 1985, writ ref'd n.r.e.). The court, in considering whether there was evidence to support a jury finding of unconscionability, stated:

> Section 17.45(5) is intended to be an objective standard. . . .The term "gross" should be given its ordinary meaning of glaringly noticeable, flagrant, complete and unmitigated.

700 S.W.2d at 583. As to subdivision A of seciton 17.45(5), the *Chastain* court said that "[t]aking advantage of a consumer's lack of knowledge to a grossly unfair degree thus requires a showing that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated," Id. at 584. The Supreme Court interpreted subdivision B to mean: "A slight disparity between the consideration paid and the value received is not unconscionable; a glaring and flagrant disparity is." Id. at 583.

According to Texas law, the primary emphasis in construing the DTPA is on the intention of the legislature, keeping in view "the old law, the evil and the remedy." *Pennington v. Singleton*, 606 S.W.2d 682, 686 (Tex.1980); *Woods v. Littleton*, 554 S.W.2d 662, 665 (Tex.1977). This intent is to be determined from the entire Act rather than from an isolated part. *Big H Auto Auction, Inc. v. Saenz Motors*, 665 S.W.2d 756, 758 (Tex.1984); *Pennington*, 606 S.W.2d at 686. Section 17.44 states that the DTPA's underlying purposes are "to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty." Tex.Bus. & Com.Code Ann. § 17.44.

With these standards in mind, we find that there was insufficient evidence to support the jury's finding that Kirby's conduct was "unconscionable" as defined in section 17.45(5)(A) and (B) of the DTPA. The evidence in the record does not support the conclusion that Kirby's actions took advantage of the knowledge, ability, experience, or capacity of Dwight's to a grossly unfair degree. The evidence and findings of fact do not indicate that Dwight's was unfairly disadvantaged by any superior bargaining power on Kirby's part. Dwight's was and still is in business making several million dollars a year from the sale of vacuum cleaners. The record shows that Dwight's was intimately familiar with the Kirby distribution system and had, on prior occasions, advised Kirby distributors how they could make sales to Dwight's and conceal these from Kirby. Dwight's knew exactly what it was doing in this transaction. The facts paint Dwight's as

an extremely capable and experienced actor in the vacuum cleaner business with a good deal of special knowledge about the internal workings of the Kirby distribution network. Under these facts, it is impossible to conclude that Kirby took advantage of any "lack of knowledge, ability, experience, or capacity" of Dwight's "to a grossly unfair degree." The evidence in the record, therefore, does not support a recovery by Dwight's under subdivision A of section 17.45(5).

Subdivision B as well does not support the jury verdict. Dwight's argues that there existed at the time of purchase a gross disparity between the value received (nothing) and the value Dwight's paid (appoximately $38,000). Kirby, on the other hand, claims that at the time of purchase Dwight's received value in the form of title in the goods, either through the bill of lading or the release from the bank, and with a value of at least the $38,000 Dwight's paid Weeks.

In *Chastain v, Koonce,* the Texas Supreme Court held that any disparity in value between the value received and the consideration paid is to be determined at the time of purchase. 700 S.W.2d at 582. See also *Bel-Go Associates – Mula Rd. v. Vitale,* 723 S.W.2d 182, 189 (Tex.App. – Houston [1st Dist] 1986, no writ). Under this principle, the vacuums Dwight's sought to buy were offered at a wholesale price ($38,000) that was much lower than the retail revenue ($96,000) Dwight's sought to gain from them. Although Dwight's argues that it paid money for the vacuums and received nothing, inasmuch as they are still in custody of a court in Washington state, the fact is that Dwight's entered into the sale knowing that Kirby could have a cause of action against it. The value of the

vacuum cleaners to Dwight's must therefore be reduced by the uncertainty of the legal status of the sale.

This conclusion is reinforced to the extent that the "gross disparity" test obviously mirrors a fraud-type measure of recovery, in which a consumer receives a product inferior in quality to that which he intended to buy or, alternatively, when the consumer is defrauded out of his money entirely. As far as the $38,000 Dwight's paid Weeks is concerned, both Dwight's and Weeks admitted at trial that Weeks' $9,000 profit had been returned to Dwight's. The other $28,740 originally forwarded to Kirby had been tendered into the registry of the Superior Court of Spokane County, Washington. The shipment of vacuum cleaners and accessories has been detained by the Washington court to await resolution of the controversy. Both goods and funds are in the hands of the court until the lawsuit in Washington is decided. Pending the outcome of the Washington state court proceedings, then, we cannot even say for certain that Dwight's has been deprived of the vacuum cleaners.

Dwight's presents the additional counter-argument that even if it violated the contract between Kirby and Weeks, Kirby had no right to file a counter-claim against Dwight's. Consequently, Dwight's asserts, the gross disparity remains. This argument is without merit and is, in fact, an affront to the principles of fair dealing.

III.

In sum, the record does not support the jury finding that Kirby acted unconscionably under the Texas DTPA. As the statute defines "unconscionability," neither did

Kirby use superior bargaining power to take advantage of Dwight's to a grossly unfair degree nor did Kirby's actions result in a gross disparity between consideration paid and value received. Under the proper standard of review, we find insufficient evidence to sustain the jury's verdict.

For the above reasons, the district court's judgment is REVERSED, and judgment is RENDERED that Dwight's take nothing.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 87-1939

D.C. Docket No. W-86-CA-143

DWIGHT'S DISCOUNT VACUUM CLEANER CITY, INC.,

Plaintiff-Appellee,

versus

THE SCOTT FETZER CO., Kirby Co. Division,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before REAVLEY, JOHNSON, and JONES, Circuit Judges.

J U D G M E N T
(Filed November 28, 1988)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and judgment is rendered that Dwight's take nothing, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IT FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

November 28, 1988

A true copy
Test Gilbert F. Ganucheau
Clerk, U.S. Court of Appeals, Fifth Circuit
By Carol G. Le Sage
Deputy
New Orleans, Louisiana
Feb. 9, 1989
ISSUED AS MANDATE: FEB. 9, 1989

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-1939

DWIGHT'S DISCOUNT VACUUM
CLEANER CITY,
PLAINTIFF-APPELLEE

V.

THE SCOTT FETZER COMPANY,
KIRBY COMPANY DIVISION,
DEFENDANT-APPELLANT

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO, TEXAS

PETITION FOR PANEL REHEARING

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ATTORNEYS FOR APPELLEE

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GROUND NO. 2 .....

This Court is limited in its review on appeal to determining "whether there was any evidence to support the jury's verdict irrespective of its sufficiency" rather than the standard set forth in *Boeing Company v. Shipman,* 411 F.2d 365 (5th Cir. 1969) which was the standard applied in this Court's opinion .....

GROUND NO. 3 .....

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PETITION FOR PANEL REHEARING

Pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, Dwight's Discount Vacuum Cleaner City, Inc. (Dwight), Appellee, respectfully petitions the Court to grant a rehearing and reconsideration of the appeal in the above entitled cause. In support of this petition, Dwight represents to the Court as follows:

1. Under *In re Owners of "Harvey Oil Center" v. Merchants Trust and Savings Bank*, 788 F.2d 275 (5th Cir. 1986), the Court applied the wrong standard of review as to the sufficiency of the evidence on unconscionable conduct because Kirby failed to move for directed verdict at the close of the evidence pursuant to Rule 50(b), or to move for judgment notwithstanding the verdict on this point pursuant to Rule 50(b).

2. This Court is limited in its review on appeal to determining "whether there was any evidence to support the jury's verdict irrespective of its sufficiency" rather than the standard set forth in *Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969) which was the standard applied in this Court's opinion.

3. This Court is without power to reverse and render judgment in light of Kirby's failure to properly preserve its sufficiency of the evidence issue for appeal.

4. The Court misapprehended the law and facts by basing its opinion on matters that were not in evidence which the jury was instructed *not* to consider in reaching their verdict.

5. The Court erred in resolving factual disputes rather than only reviewing the evidence to determine whether there was any evidence to support the jury's verdict.

The first three grounds for rehearing are related and will be argued together.

ARGUMENT AND AUTHORITIES FOR GROUNDS ONE THROUGH THREE

This Court's opinion states at page 681 "Appellant Kirby properly preserved its objections to the sufficiency of the evidence by means of a Motion for Judgment Notwithstanding the Verdict." The Court then states at page 682 "The key question is whether judgment n.o.v. should have been granted on the finding that Kirby acted unconscionably under the DTPA." The Court then determined that there was insufficient evidence to support the jury's finding that Kirby's conduct was unconscionable based on the *Boeing v. Shipman* test. (Opinion, pg. 681-684).

This Court applied the wrong standard because the sufficiency of the evidence to support the jury's finding of unconscionable conduct was never raised by Kirby in either a motion for directed verdict or for judgment n.o.v.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1939

DWIGHT'S DISCOUNT VACUUM
CLEANER CITY, INC.,
Plaintiff-Appellee,

versus

THE SCOTT FETZER CO., Kirby Co. Division,
Defendant-Appellant.

Appeal from the United States
District Court for the
Western District of Texas

ON PETITION FOR REHEARING

(JANUARY 30, 1989)

Before REAVLEY, JOHNSON and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT: 1/25/89

/s/ Edith H. Jones
United States Circuit Judge

FIFTH CIRCUIT OPINIONS IN CONFLICT WITH OPINION IN THE INSTANT CASE

HINOJOSA V. THE CITY OF TERRELL, TEXAS, ET AL
834 F.2d 1223 (5th Cir. 1988)

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715 F.2d 213 (5th Cir. 1983)

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628 F.2d 509 (5th Cir. 1980)

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597 F.2d 997 (5th Cir. 1979)

COUGHLIN V. CAPITOL CEMENT CO.
571 F.2d 290 (5th Cir. 1978)

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504 F.2d 518 (5th Cir. 1974)

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491 F.2d 141 (5th Cir. 1974)

JEFFERSON REALTY OF SOUTH DADE, INC.
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410 F.2d 847 (5th Cir. 1969)

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327 F.2d 987 (5th Cir. 1964)

YORKSHIRE INDEMNITY COMPANY OF NEW YORK
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252 F.2d 650 (5th Cir. 1958)

EXCERPTS OF TRIAL COURT TESTIMONY
(p. 236) Krzywonski - F. Redirect

THE COURT: Now you may step down, sir.

MR. MOODY: We have a motion at an appropriate time, Your Honor.

THE COURT: All right, sir.

MR. McDONALD: Judge, we have a witness that's on the way. If the Court might want to take a little vac - vacation - I mean recess at this point in time.

THE COURT: All right. It's 10:15; let's go ahead and take our morning recess just a little early until 10:30.

MR. MOODY: Your Honor, I could make that motion right quickly.

THE COURT: All right, sir.

Go ahead, Ladies and Gentlemen - or Gentlemen.

(Jury out.)

THE COURT: Be seated, folks.

Mr. Moody?

MR. MOODY: Your Honor, we move the Court for a directed verdict on the Plaintiff's claims under the Texas Deceptive Trade Practices Act. The Plaintiff has offered direct evidence that he had no dealings whatsoever with the Kirby Company, that no representations were made to him that he did not seek to acquire, by purchase or lease, goods or services from the Kirby Company. Therefore, he's not a consumer with relation to the Kirby Company.

No representations were made; he has no cause of action by his own admission under the Texas (p. 237) Deceptive Trade Practices Act.

THE COURT: The motion will be denied, at least at this time.

We'll be in recess until 10:30.

(p. 466) *PLAINTIFF RESTS*

MR. McDONALD: Judge, other than perhaps maybe some cleanup of the exhibits, I think the rest of this probably will - my case will flow from maybe some of their witnesses, that I desire cross-examination. At this time, the Plaintiff will rest.

THE COURT: All right.

(p. 467) MR. McDONALD: I would like to - that's all right. That's okay. I rest.

THE COURT: All right. Gentlemen, it's about 12 minutes until 5:00. There are in every case certain legal matters that have to be taken up after one side rests, which we will do now.

Would any of you have any difficulty being here at 8:30 in the morning?

Let's start at 8:30, then, and see if we can't really get a lot accomplished tomorrow. We'll see you at 8:30 in the morning. Please remember the instructions I've given you, not to discuss the case with anyone and to be sure that you don't obtain any information about it outside the courtroom. See you in the morning.

(Jury out.)

DEFENDANT'S MOTION FOR DIRECTED VERDICT

THE COURT: Be seated, folks.

Motions, Mr. Moody?

MR. MOODY: Yes, sir. We would like to renew our Motion for a Directed Verdict on the claims under the Texas Deceptive Trade Practices Act, based on the direct testimony of the Plaintiff himself and the testimony of others. He himself has said that he has had no direct dealings with the Kirby Company, that he has not sought to acquire by lease or purchase goods or services from the Kirby Company, that no one at the (p. 468) Kirby Company made any representations to him of title. And in fact, the evidence has indicated that not only did Kirby feel it had title, it still does. So we feel that there is no basis for the claims under the Texas Deceptive Trade Practices Act.

THE COURT: Let me review the Plaintiff's pleadings, and I'll rule on that in the morning.

MR. MOODY: All right. Your Honor, I might add -

MR. McDONALD: May I make one statement in response, Judge, just while you're doing your looking in the morning? There is no requirement of privity. This woman is a consumer, and that's it, period.

MR. MOODY: Judge, Carol Weeks is not a party to this lawsuit.

Second, in the event that the Court chooses to grant our Motion For a Directed Verdict, I would point out to the Court that the Plaintiff's only basis for the recovery of

attorney's fees is under the Texas Deceptive Trade Practices Act. And without that cause of action, the last exhibit that was admitted becomes irrelevant, and we would object to it on that basis.

THE COURT: All right, sir.

See you in the morning, counsel.

(p. 468) (Recessed at 4:48 p.m.)

* * *

(p. 484) THE COURT: The Motion for Instructed Verdict made yesterday will be denied.

Let's bring the jury in.

(Whereupon the Defendant proceeded to put on its evidence.)

(p. 817) *DEFENDANT CLOSE AND REST*

MR. MOODY: Defendant closes, Your Honor.

THE COURT: You may step down, sir.

Gentlemen, those magic words mean that that concludes (p. 818) the evidence in this case. The next order of business is the preparation of the Court's charge on the law. When that's been done, then we'll be ready to have final arguments. The charge is virtually completed, but the attorneys have the right and the obligation to have some input into that. So at this point, I'm going to recess you to the jury area for what I hope will only be a half an hour or 45 minutes. But in any event, we'll be asking you back in to hear final arguments just as soon as we can get ready.

(Jury out.)

THE COURT: Be seated, folks.

Any motions at this point from anyone?

MR. MOODY: We have none, Your Honor.

THE COURT: All right.

UNITED STATES CONSTITUTION, AMENDMENT 7

Trial by jury in civil cases.
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 50
(Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict)

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the Evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any

judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Supreme Court, U.S.
FILED
MAY 17 198
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1755

In The

Supreme Court of the United States

October Term, 1988

DWIGHT'S DISCOUNT
VACUUM CLEANER CITY, INC.,

Petitioner,

v.

THE SCOTT FETZER COMPANY,
KIRBY COMPANY DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Please Serve:

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No. 88-1755

In The

Supreme Court of the United States

October Term, 1988

DWIGHT'S DISCOUNT
VACUUM CLEANER CITY, INC.,

Petitioner,

v.

THE SCOTT FETZER COMPANY,
KIRBY COMPANY DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent The Scott Fetzer Company, Kirby Company Division,[1] respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by petitioner Dwight's Discount Vacuum Cleaner City, Inc.,

[1] In compliance with Supreme Court Rule 28.1, respondent shows that The Scott Fetzer Company, Kirby Company Division, is a wholly owned subsidiary of BHSF, Inc., which is a wholly owned subsidiary of Berkshire Hathaway Corp.

seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on November 28, 1988.

OPINION BELOW

The judgments of the courts below are attached as appendices to Petitioner's petition.

STATEMENT OF THE CASE

Petitioner Dwight's Discount Vacuum Cleaner City, Inc., sued respondent The Scott Fetzer Company, Kirby Company Division, alleging conversion, interference with contractual rights, and violations of the Texas Deceptive Trade Practices-Consumer Protection Act, *Tex. Bus. & Comm. Code* §17.41 et seq., which creates causes of action for certain types of misrepresentation and unconscionable acts in the consumer setting. Respondent Kirby filed a counterclaim against Dwight's for tortious interference with its distributorship agreement. The opinion of the Court of Appeals accurately sets forth the factual background of this case. (App. to Pet. 20)

During the course of the jury trial Kirby moved for a directed verdict on the petitioner's claims under the Texas Deceptive Trade Practices Act generally and specifically argued at that time that petitioner had failed to establish itself as a consumer under the Act. (App. to Pet. 42) This motion was overruled. Following the close of petitioner's evidence Kirby renewed its motion for

directed verdict on the claims under the Texas Deceptive Trade Practices Act. (App. to Pet. 44) This motion also was overruled. (App. to Pet. 45)

The jury found that Kirby had not converted petitioner's property and had not interfered with a contract of petitioner's, but found that Kirby had committed unconscionable acts. The jury found for Kirby on its counterclaim against petitioner for tortious interference but failed to find damages. The trial court entered judgment in favor of petitioner.

Kirby filed a Motion for Judgment Notwithstanding the Verdict or, Alternatively, for New Trial, on the grounds that petitioner was not a consumer under the Act and that the only basis for damages was the jury's finding of unconscionable action under the Act, and there was insufficient evidence to support the jury's finding on unconscionable action. (App. to Pet. 12) These motions were denied. (App. to Pet. 17)

Kirby appealed to the Fifth Circuit Court of Appeals seeking reversal and rendition of judgment or in the alternative, remand for a new trial. That court, following its in-depth review of the record, found that "Kirby properly preserved its objections to the sufficiency of the evidence by means of a motion for judgment notwithstanding the verdict." The court found the evidence insufficient to support the jury's finding of unconscionable conduct, and reversed and rendered judgment that petitioner take nothing.

REASONS FOR DENYING THE WRIT

1.

Respondent Kirby complied with Rule 50 by making a motion for directed verdict on Dwight's claims under the Texas Deceptive Trade Practices Act. That Act was the sole basis for Dwight's claims of unconscionable conduct. *Tex. Bus. & Comm. Code* §17.50(a)(3). This motion was first made following the conclusion of the testimony of Dwight Krzywonski, president of the petitioner corporation. It was renewed at the close of the petitioner's evidence. While it is true that the motion for directed verdict was not made again at the close of all of the evidence, this is not an absolute requirement. *Hinojosa v. City of Terrell, Texas*, 834 F.2d 1223, 1228 (5th Cir. 1988); *Bohrer v. Hanes Corporation*, 715 F.2d 213, 216-17 (5th Cir. 1983). Kirby sufficiently complied with Rule 50 by making its motion for directed verdict at the conclusion of Krzywonski's testimony and again at the close of the petitioner's evidence.

Following the return of the verdict Kirby moved for judgment notwithstanding the verdict on Dwight's claims under the Texas Deceptive Trade Practices-Consumer Protection Act. On appeal to the Fifth Circuit Court of Appeals, Kirby complained of the insufficiency of the evidence to support the jury's finding of unconscionable conduct, and requested reversal *and rendition* or in the alternative, a new trial.

Kirby thus complied with the procedural prerequisites to obtain reversal and rendition of judgment in its favor, and Dwight's Petition for Writ of Certiorari should be denied.

2.

The holding of the court of appeals in this case is not "in conflict with" any of the holdings of the opinions of the Fifth Circuit, other circuits, or this Court cited by petitioner. The holding of the court of appeals is simply that the evidence is insufficient to support the jury's finding of unconscionable conduct on the part of Kirby. That holding does not conflict with any of the cases listed by petitioner.

3.

The Fifth Circuit Court of Appeals did not, as petitioner contends, substitute its factual findings for those of the jury. The Court analyzed the two-part definition of "unconscionable conduct" as contained in the Act and submitted to the jury.

The first part of the definition is conduct which "takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree." The court stated,

> Under these facts, it is impossible to conclude that Kirby took advantage of any "lack of knowledge, ability, experience, or capacity" of Dwight's "to a grossly unfair degree." The evidence in the record, therefore, does not support a recovery by Dwight's under subdivision A of section 17.45(5).

The second type of unconscionable conduct is that which "results in a gross disparity between the value received and consideration paid. . . ." The court held that the evidence did not support a finding of this sort of unconscionable conduct.

The court's holding was a legal determination of the sufficiency of the evidence. The court did not attempt to second-guess the jury or substitute its own findings for those of the jury.

4.

The Court of Appeals *did not hold,* as petitioner argues, that compliance with Rule 50 is not a necessary predicate to rendition of judgment on appeal. This is a pure and simple misstatement of the court's holding. The court did observe that Kirby properly preserved its complaint by means of a motion for judgment notwithstanding the verdict. (App. to Pet. 24) Kirby twice moved for a directed verdict on petitioner's claims under the Act, laying the proper predicate for a motion for judgment notwithstanding the verdict on petitioner's claims under the Act. Not having held that Rule 50 is not a predicate to rendition on appeal, the Fifth Circuit Court of Appeals is not in conflict with any other opinion cited by petitioner.

Most of the cases cited and relied on by petitioner involve the complete failure of the party challenging the judgment to make a motion for directed verdict and are therefore not applicable to this case. See for example *In re Owners of "Harvey Oil Center" v. Merchants Trust & Savings Bank,* 788 F.2d 275 (5th Cir. 1986), where the appellant sought to challenge the sufficiency of the evidence supporting the award of damages. Justice Jones stated: "Because Merchants failed to move for a directed verdict at the close of the plaintiffs' case, *see* Fed. R. Civ. P. 50(a), its motion for judgment notwithstanding the verdict on this point had no proper predicate." 788 F.2d at 278. See

also *Bunch v. Walter*, 673 F.2d 127 (5th Cir. 1982), where Justice Brown observed, "[O]ur review of the record reveals no motion by Bunch for directed verdict or for judgment notwithstanding the verdict." 673 F.2d at 129.

Because Kirby did move for a directed verdict at the close of petitioner's evidence on all of petitioner's claims under the Act, and filed a motion for judgment notwithstanding the verdict on petitioner's claims under the Act, the cases relied on by petitioner are not controlling.

5.

Respondent Kirby expressly sought and prayed for reversal and rendition of judgment in its favor in its Brief for Appellant in the court of appeals. Petitioner did not respond in its brief that the court of appeals was not procedurally authorized to reverse and render judgment, but instead spent a great deal of time chastising respondent for allegedly failing to include sufficient record references in its brief and requesting monetary sanctions against respondent and its attorneys personally for taking a frivolous appeal. By failing to complain about respondent's request for rendition until after it had lost in the court of appeals, petitioner waived any objection concerning procedural prerequisites for rendition of judgment. *Hoover v. Ronwin*, 466 U.S. 558, 574, 104 S.Ct. 1989, 80 L.Ed 2d 590, 603 n. 25 (1984). Respondent submits that the reason petitioner did not complain of respondent's prayer for reversal and rendition on the issue of unconscionablity is because it knew that respondent had moved for directed verdict and judgment notwithstanding the verdict on all of petitioner's claims under the Deceptive

Trade Practices-Consumer Protection Act, and only did so in its motion for rehearing in an effort to retrieve its unjustifiably favorable trial court judgment.

6.

Even under the standard of review applicable when a party does not move for a directed verdict or judgment notwithstanding the evidence, the holding and opinion of the Court of Appeals are correct and do not require review by this Court.

When no motion for directed verdict is made and no motion for judgment notwithstanding the verdict is filed, the Court of Appeals reviews the evidence to determine whether there was *any* evidence to support the jury's verdict, or whether plain error was committed which, if not corrected, would result in a gross miscarriage of justice. *In re Owners of "Harvey Oil Center", supra,* 788 F.2d at 278.

The court held that "there was insufficient evidence to support the jury's finding that Kirby's conduct was 'unconscionable' as defined in section 17.45(5)(A) and (B) of the DTPA." (App. to Pet. 28) The discussion following that holding makes it clear the court in reality was saying that there was *no* evidence to support the jury's finding of unconscionable conduct.

Under the first standard set out in §17.45(5)(A), the court said, "Under these facts, *it is impossible to conclude* that Kirby took advantage of any 'lack of knowledge, ability, experience, or capacity' of Dwight's 'to a grossly unfair degree'." (App. to Pet. 29) (Emphasis added.)

As to the second standard set out in §17.45(B) involving a gross disparity between value received and consideration paid, the court said, "subdivision B as well does not support the jury verdict." (App. to Pet. 29)

It is clear from the court's opinion that even were the court reviewing the record to determine whether *any* evidence supported the jury's finding of unconscionable conduct, the result would be the same. Based on the record, Kirby *did not* engage in unconscionable conduct against petitioner.

7.

This is not a case where the court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power. The issues attempted to be raised by petitioner in this case are not, contrary to petitioner's contention, of such importance to the Bench and Bar as to require this Court to resolve any conflict in decisions. The opinion of the court of appeals in this case, finding respondent's motion for judgment notwithstanding the verdict sufficient to preserve error, and then finding insufficient evidence to support the jury's finding of unconscionable conduct on Kirby's part, sets no precedent and does not "operate to overrule" any previous decision of any court. Petitioner's ruminations about anarchy in the courts are an effort to sway this Court with an emotional appeal because petitioner is unhappy with losing a judgment to which it was not entitled by the evidence. This is not an issue of importance to the public as distinguished from the parties to this litigation. *Rice v.*

Sioux City Cemetery, 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed 897, 904 (1954); *National Labor Relations Board v. Pittsburg Steamship Company*, 340 U.S. 498, 502, 71 S.Ct. 453, 95 L.Ed 479, 482 (1951).

The court of appeals minutely reviewed the voluminous record in this case and properly concluded that the finding of unconscionable conduct was not supported by the evidence. The court, and properly so, went so far as to characterize petitioner's argument for affirmance as "an affront to the principles of fair dealing." (App. to Pet. 30)

CONCLUSION & PRAYER

For all of the foregoing reasons respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1755

In The

Supreme Court of the United States

October Term, 1988

DWIGHT'S DISCOUNT
VACUUM CLEANER CITY, INC.,

Petitioner,

v.

THE SCOTT FETZER COMPANY,
KIRBY COMPANY DIVISION,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

Petitioner, Dwight's Discount Vacuum Cleaner City, Inc. is a close corporation wholly owned by its President, Dwight Krzywonski.

Respondent, the Scott Fetzer Company, Kirby Company Division, is a wholly owned subsidiary of BHSF, Inc. which is a wholly owned subsidiary of Berkshire Hathaway Corp.

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In The

Supreme Court of the United States

October Term, 1988

DWIGHT'S DISCOUNT
VACUUM CLEANER CITY, INC.,

Petitioner,

v.

THE SCOTT FETZER COMPANY,
KIRBY COMPANY DIVISION,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Dwight's Discount Vacuum Cleaner City, Inc., pursuant to Supreme Court Rule 22, respectfully submits this Reply to the Brief In Opposition to the Petition for Writ of Certiorari filed herein by Respondent Scott Fetzer Company, Kirby Company Division.

CORRECTION TO RESPONDENT'S STATEMENT OF THE CASE

Respondent has wholly misstated the vitally important procedural background of this case in its brief in opposition (pp. 2-3). These issues will be addressed first in this reply.

Respondent incorrectly states that it moved for a directed verdict on Petitioner's claims under the Deceptive Trade Practice Act as a whole at the close of the Petitioner's case (pp. 2,3). The record clearly shows Respondent confined its oral motion and argument thereon to Petitioner's status as a consumer under the Act (App. to Pet. pp. 43-45).

Furthermore, Respondent incorrectly states that it raised the issue of the insufficiency of the evidence of unconscionable conduct in its motion for judgment n.o.v. (p. 3).

Reduced to its simplest and clearest terms, Respondent's motion for judgment n.o.v. alleged one ground as follows, "Defendant would show that plaintiff is not entitled to recovery under said Act for the reason that Plaintiff did not plead, prove, or procure a finding or otherwise establish that it is a *consumer* under said Act." (App. to Pet. pp. 12-13).

The trial court properly denied the motion for judgment n.o.v., finding Respondent's argument that Petitioner was not a consumer under the Deceptive Trade Practice Act to be without merit (App. to Pet., p. 18).

Respondent also represents that it raised in the Court of Appeals as a point of error the trial court's failure to

grant a motion for judgment n.o.v. on the insufficiency of the evidence to support the jury's finding of unconscionable conduct (p. 4). This too is incorrect.

In its brief before the Court of Appeals, the only point of error raised by Respondent concerning motion for judgment n.o.v. was:

> In summary, *consumer status* is an essential element of Dwight's (Petitioner's) cause of action under the Act, and it was Dwight's burden to plead and prove that status . . . Dwight failed to carry that burden. That being the case, Kirby was entitled to judgment notwithstanding the verdict. (App. to Reply, p. 4).

Mistakenly, the Court of Appeals determined the key question to be "whether judgment n.o.v. should have been granted on the finding that Kirby acted unconscionably under the D.T.P.A." (App. to Pet., p. 26) although in fact this was never presented to the trial court or Court of Appeals (App. to Pet., pp. 12-13, App. to Reply, p. 2. The Court of Appeals then reviewed the evidence, disagreed with the jury's assessment thereof, and reversed and rendered judgment on this ground never urged by Respondent. (App. to Pet., pp. 24,31).

Therefore, the first time Respondent *ever* asserted that it was entitled to entry of judgment n.o.v. on the issue of insufficient evidence of unconscionable conduct was in May of 1989 in its Brief in Opposition to Petition for Writ of Certiorari which is the subject of this reply. Respondent's numerous assertions contrary to the record must be disregarded. *Hicks v. Mickelson*, 835 F.2d 721 (8th Cir. 1987); *Goldstein v. Kelleher*, 728 F.2d 32 (1st Cir. 1984); *Rosen v. Lawson-Hemphill, Inc.*, 549 F.2d 205 (1st Cir. 1976).

Respondent's statement that the appellate court characterized Petitioner's argument for affirmance as "an affront to the principles of fair dealing" is not true. (p. 10). In the context of the opinion, it is clear that the Court was referring to an argument supposedly advanced by Petitioner as to Respondent's lack of right to assert a counter-claim (App. to Pet., p. 30).

However, in its petition for rehearing Petitioner pointed out to the Court that the Court had misinterpreted Petitioner's argument in this regard (App. to Reply, p. 6).

While the substance of Respondent's personal attacks on counsel set forth in paragraph 5 on page 7 of its brief are inaccurate and inappropriate, Petitioner will refrain from replying thereto.

REPLY TO RESPONDENT'S REASONS FOR DENIAL OF THE WRIT

1. Abrogation of the Seventh Amendment Right To Trial By Jury Is Inherently A Matter Of Public Importance.

Respondent asserts that the appellate court's abridgement of the Seventh Amendment is not a matter of public importance (p. 9). This is contrary to the position taken by this Court since at least 1947 in *Cone v. West Virginia Pulp & Paper Company*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed 849 (1947). See also *Commentary*, 83 S.Ct. 43 (1963). Petitioner thoroughly discussed this point in its petition though none of these cases have been addressed by Respondent (Pet. pp. 1-10).

Clearly, Respondent's disregard for the Seventh Amendment is without support in the law. *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1962); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962). The issues raised herein are a matter of importance not only to this Petitioner but to every citizen who shares in the protections of the Constitution.

2. Petitioner Did Not Waive Its Right To Complain About The Appellate Court's Sua Sponte Judgment Unsupported by the Record.

Respondent asserts that Petitioner "waived" the right to complain about the appellate court's power to render judgment on the issue of unconscionable conduct by not raising the issue until after the Court of Appeals rendered its decision (p. 7). For this argument to have merit, Petitioner would have had to anticipate that the Court of Appeals was going to exceed its power and authority and render judgment on an issue not before it.

It is Respondent's burden to bring before the appellate court a record sufficient to sustain its position. *Moran v. Raymond Corp.*, 484 F.2d 1008 (7th Cir. 1973). Having failed to do this, it is Respondent who waived its right to seek reversal and rendition of judgment on appeal on the unconscionable conduct issue. *Sector Refining, Inc. v. Enterprise Refining Co.*, 771 F.2d 496 (Temp.Emer.Ct.App. 1985); *Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986); *Kinzenbaw v. Deere and Co.*, 741 F.2d 383 (Fed.Cir. 1984); *Power Lift, Inc. v. Lang Tools, Inc.*, 774 F.2d 478 (Fed.Cir. 1985); *Lifshitz v. Walter Drake & Sons, Inc.*, 806

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Furthermore, Petitioner immediately objected to the appellate court's error in its petition for rehearing (App. to Pet., pp. 34-38). The Court of Appeals still had the power to correct its error though it failed or refused to do so (App. to Pet., p. 39). Compare *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2nd Cir. 1970). There is therefore no merit to Respondent's waiver allegations.

3. Petitioner Is Entitled To Reinstatement Of The Trial Court Judgment By This Court.

Respondent asserts that Petitioner is entitled to no relief from this Court even assuming Respondent failed to comply with Rule 50. (pp. 8,9). The law is clearly to the contrary since failure to comply with Rule 50 precludes rendition of judgment on appeal even in the event that there is *no* evidence in the record to support the judgment. (Pet. pp. 7-20, App. to Pet. pp. 40,41).

However, contrary to Respondent's statements that in reality the appellate court found no evidence to support the verdict (pp. 8-9), the Court of Appeals actually held that there was *some* evidence to support the verdict though insufficient (App. to Pet., pp. 28,29,30,31). This characterization of the evidence by the Court was obviously intentional since the Court devoted portions of at least three pages of its opinion to a discussion of the sufficiency of the evidence and its standard of review

(App. to Pet., pp. 24-25, 28). Since the appellate court conceded the existence of evidence in the record to support the verdict, however insufficient, the trial court's judgment must be reinstated. *Bunch v. Walter*, 673 F.2d 127 (5th Cir. 1982); *Sheib v. Williams-McWilliams Company, Inc.*, 628 F.2d 509 (5th Cir. 1980); *In Re Owners of Harvey Oil Center v. Merchants Trust & Savings Bank*, 788 F. 2d 275 (5th Cir. 1986).

This Court has the power upon review to reverse the Court of Appeals' judgment and reinstate that of the trial court. Title 28 USCS Sec. 2106. (App. to Reply, p. 7). This is the relief respectfully requested by Petitioner and required under the law and the record before the Court.

CONCLUSION AND PRAYER

Petitioner respectfully prays that the Petition for Writ of Certiorari be granted; that the judgment of the Court of Appeals be reversed and that pursuant to Title 28 USCS Sec. 2106 the judgment of the trial court be reinstated.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1939

DWIGHT'S DISCOUNT VACUUM CLEANER CITY,

PLAINTIFF-APPELLEE

v.

THE SCOTT FETZER COMPANY, KIRBY COMPANY DIVISION,

DEFENDANT-APPELLANT

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO, TEXAS

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* * *

FACTS, ARGUMENT AND AUTHORITIES

I. *Whether plaintiff Dwight's Discount Vacuum Cleaner City was a consumer so as to make the remedies provided by the Texas Deceptive Trade Practices-Consumer Protection Act available against defendant Kirby.*

Section 17.50 of the Act provides:

> (a) A *consumer* may maintain an action where any of the following constitute a producing cause of actual damages:
>
> (3) any unconscionable action or course of action by any person; (Emphasis added.)

It has been held repeatedly that one must be a consumer to maintain an action and recover damages under the Act. *Riverside National Bank v. Lewis*, 603 S.W.2d 169, 173 (Tex. 1980); *Bancroft v. Southwestern Bell Telephone Company*, 616 S.W.2d 335, 337 (Tex. Civ. App. – Houston [14th Dist.] 1981 n.w.h.). A party seeking recovery under the Act has the affirmative obligation to plead his consumer status and prove it. *Farmers & Merchants State Bank v. Ferguson*, 617 S.W.2d 918, 920 (Tex. 1981); *Delaney Realty, Inc. v. Ozuna*, 593 S.W.2d 797, 800 (Tex. Civ. App. – El Paso, writ ref'd n.r.e., 600

* * *

acquire a shipment of vacuum cleaners and accessories from Carol J. Weeks, it did not plead facts that would tend to make Kirby a participant in that transaction in any way. Furthermore, it was not Kirby's burden to seek a jury finding on the consumer issue; it was Dwight's and Dwight failed to carry that burden. That being the case, Kirby was entitled to judgment notwithstanding the verdict.

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-1939

DWIGHT'S DISCOUNT VACUUM CLEANER CITY,
PLAINTIFF-APPELLEE

V.

THE SCOTT FETZER COMPANY, KIRBY COMPANY DIVISION,
DEFENDANT-APPELLANT

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO, TEXAS

PETITION FOR PANEL REHEARING

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* * *

The Court's statement on page 680 that Kirby believed it was entitled to reclaim the goods was one of the most contested issues. The evidence shows that Kirby's only remedy was to *repurchase* unsold goods that

Weeks had on hand as of the date of termination (July 3, 1986) of the distributorship agreement, *which did not include the goods already sold to Dwight on June 26, 1986.* (p. 42, 104, 178, 262, 301-303, 355-360, 362, 363, 364, 365, 557, 558, 561, 570, 578, 591, 593, 780, 781, 782, 395, 396, 400, 555, 557, 558, 561, 578, 590, 747, 780-783).

The statement on page 681 that Weeks returned $9,000.00 to Dwight before trial is incorrect to the extent that Dwight repaid $4,500.00 to Week's estate through the Bankruptcy Court prior to trial. (p.200).

The Court's statement at page 680 that Kirby's marketing system is organized exclusively on direct in-home sales is disputed in the evidence. (p. 290, 293, 366, 367, 552, 620-627, 809-810).

On page 684 of the opinion, the Court stated that one of Dwight's arguments was that Kirby had no right to file a counterclaim against Dwight's. This is incorrect for Dwight's brief refers specifically to Kirby's counterclaim against Dwight (p. 16-17). Furthermore, in oral argument, counsel for Dwight argued that Kirby's remedy was a counterclaim against Dwight for any alleged damages rather than exclusion of coverage to Dwight under the DTPA.

* * *

28 U.S.C.S., Sec. 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings, to be had as may be just under the circumstances.